

REGISTRAR'S SUBMISSION PACKAGE

BOARD OF MEDICINE 18 VAC 85-80-10 et seq.

Analysis of Proposed Amendments to Regulation

1. Basis of Regulation:

Title 54.1, Chapter 24 and Chapter 29 of the Code of Virginia provide the basis for these regulations.

Chapter 24 establishes the general powers and duties of health regulatory boards including the power to establish qualifications for licensure and responsibility to promulgate regulations.

§§ 54.1-2956.1 through 54.1-2956.5 establishes the requirement for the licensure of this profession and specifies the powers and duties of the Advisory Board on Occupational Therapy.

2. Statement of Purpose:

The purpose of the proposed is to amend regulations pursuant to changes in the Code of Virginia made in Chapter 593 of the 1998 Acts of the Assembly which required the Board to promulgate regulations for the licensure of occupational therapists. In accordance with the second enactment clause, the Board promulgated emergency regulations which became effective on January 29, 1999. These proposed regulations replace the emergency regulations and are intended to establish those qualifications for licensure which are necessary to protect the public health and safety in the delivery of occupational therapy services.

3. Substance of Regulations:

18 VAC 85-80-10. A definition of “active practice” was added in the proposed regulations (not included in the emergency regulations) to specify that the active practice of occupational therapy may include activities that are not direct patient care. Other amendments are technical and not substantive.

18 VAC 85-80-25. A new section was added to require licensees to furnish current name and address within 30 days of any change and to specify that notices mailed or served by the Board to the name and address on file shall be validly given.

18 VAC 85-80-35. Application requirements have been amended to state some of the current requirements, such as submission of an application form, fee and credentials, that are found in other sections and to specify the documentation or verification necessary to become licensed as an occupational therapist.

18 VAC 85-80-40. An amendment is proposed to remove the specific score required for passage of the Test of English as a Foreign Language examination (TOEFL) and state that the score must be acceptable to the Board. The amendment will allow the Board to adjust the acceptable score whenever the examination service adjusts its scoring scale for a recommended cut score.

18 VAC 85-80-50. Amendments are adopted to clarify that an applicant who must have passed the national examination from National Board for Certification in Occupational Therapy.

18 VAC 85-80-60. An amendment provides that an applicant for licensure who has practiced in another jurisdiction but has not been engaged in active practice of occupational therapy for two years or more shall serve a board-approved practice of at least 160 hours under the supervision of a licensed occupational therapist. This requirement will parallel the minimum requirement for renewal of licensure by an occupational therapist in Virginia.

18 VAC 85-80-70. The current regulations require that an occupational therapist be professionally active in order to renew each biennium. The amendment will specify what is intended by the requirement – that the licensee must have practiced at least 160 hours during the past biennium. Other amendments are editorial only.

18 VAC 85-80-80. A proposed amendment will require that anyone who has allowed his license to lapse for two or more years should serve a board-approved practice of at least 160 hours under the supervision of a licensed occupational therapist.

4. Issues of the Regulations

ISSUE 1: Evidence of competency for licensure.

The Board is required by § 54.1-2956.1 to “take such actions as may be necessary to ensure the competence and integrity of any person who claims to be an occupational therapist or who holds himself out to the public as an occupational therapist, and to that end it may license practitioners as occupational therapists.” Before July 1, 1998, occupational therapists were certified by the Board of Medicine; certification was title protection and therefore voluntary for practitioners.

As a certified profession regulated by the Board of Medicine, occupational therapists were required to indicate some professional activity as evidence of competency for biennial renewal of a license, but the level of that activity was undefined. Since they are now a licensed

profession, it is expected that there be some further definition of active practice to determine qualification for initial licensure and for continued renewal of licensure. The Board determined that evidence of 160 hours of active practice in the profession within the past two years was the least burdensome regulation it could reasonably impose. Such a requirement is consistent with other professions that have a requirement for active practice, such as physical therapy and respiratory therapy.

To accommodate persons whose practice as an occupational therapist may now include educational, administrative, supervisory or consultative services rather than direct patient care, the Board added a definition of “active practice” to clarify that those professional activities were acceptable for the purpose of fulfilled the renewal or initial licensure requirements.

The current regulations require 160 hours of supervised practice for an applicant or a lapsed licensee who has been out of practice for six or more years. In adopting regulations for licensure, the Advisory Board strongly recommended changing the regulation to require supervised practice for anyone who has not actively practiced for two or more years. With the changes occurring in health care, an occupational therapist who has not practiced at least 160 hours over a two-year period has likely not remained current with professional knowledge and skills.

Advantages and disadvantages

There are no disadvantages to the public, which is better protected by having a requirement for hours of active practice in order to renew an active license or become licensed in Virginia from another state.

An occupational therapist who is maintaining an active license to practice should be required to work a minimal number of hours during the biennium in order to keep up with a rapidly changing, highly technical field. The requirement of 160 hours of practice (the equivalent of four weeks) with a two-year period is easily obtainable, even for persons who are working only on a part-time basis.

5. Estimated Fiscal Impact of the Regulations

I. Fiscal Impact Prepared by the Agency:

Number of entities affected by this regulation:

There are 1,769 occupational therapists licensed in Virginia.

Projected cost to the agency:

The agency will incur some costs (less than \$1000) for mailings to the Public Participation Guidelines Mailing List, conducting a public hearing, and sending copies of final regulations to regulated entities. Since these regulations are being amended simultaneously with other regulations of the Board, the costs of mailings, meetings and hearings will be shared by several professions. In addition, every effort will be made to incorporate those into anticipated mailings and board meetings already scheduled.

Projected costs to the affected entities:

There would be no additional costs for compliance with these regulations for occupational therapists who have kept a current license in the Commonwealth. While the Board has not kept a record of lapsed licensees, it is estimated that there have been less than 5 persons who have allowed their license to lapse for more than one year. Most have resumed practice within 6 months to one year. Therefore, it is unknown whether anyone would be affected by the reinstatement requirement of 160 hours of practice under the supervision of a licensed occupational therapist.

Citizen input in development of regulation:

In the development of regulations, notices were sent to persons on the public participation guidelines mailing list of every meeting of the Advisory Board on Occupational Therapy, the Legislative Committee of the Board, and of the Board itself. A Notice of Intended Regulatory Action was also sent to persons on the list; no comment was received on the NOIRA. Public comment was also received at each meeting.

Localities affected:

There are no localities affected by these regulations in the Commonwealth.

II. Fiscal Impact Prepared by the Department of Planning and Budget:

(To be attached)

III. Agency Response:

c. Source of the legal authority to promulgate the contemplated regulation.

18 VAC 85-80-10 et seq. Regulations for the Licensure of Occupational Therapists was promulgated under the general authority of Title 54.1 of the Code of Virginia.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations, levy fees, administer a licensure and renewal program, and discipline regulated professionals.

§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- 4. To establish schedules for renewals of registration, certification and licensure.*
- 5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*
- 7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations.*
- 8. To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.*
- 9. To take appropriate disciplinary action for violations of applicable law and regulations.*

10. *To appoint a special conference committee, composed of not less than two members of a health regulatory board, to act in accordance with § 9-6.14:11 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final thirty days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the thirty-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 9-6.14:12, and the action of the committee shall be vacated. This subdivision shall not be construed to affect the authority or procedures of the Boards of Medicine and Nursing pursuant to §§ 54.1-2919 and 54.1-3010.*

11. *To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to conduct formal proceedings pursuant to § 9-6.14:12, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 9-6.14:11 shall serve on a panel conducting formal proceedings pursuant to § 9-6.14:12 to consider the same matter.*

12. *To issue inactive licenses and certificates and promulgate regulations to carry out such purpose. Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for reactivation of such licenses or certificates.*

In addition to provisions in § 54.1-2400 which authorizes the Board to set qualifications and standards for licensure, the Code provides a mandate for continuing competency and for licensure of occupational therapists:

§ 54.1-2912.1. Continued competency requirements.

- A. *The Board shall prescribe by regulation such requirements as may be necessary to ensure continued practitioner competence which may include continuing education, testing, and/or any other requirement.*
- B. *In promulgating such regulations, the Board shall consider (i) the need to promote ethical practice, (ii) an appropriate standard of care, (iii) patient safety, (iv) application of new medical technology, (v) appropriate communication with patients, and (vi) knowledge of the changing health care system.*
- C. *The Board may approve persons who provide or accredit such programs in order to accomplish the purposes of this section.*

§ 54.1-2956.1. Powers of Board concerning occupational therapy.

The Board shall be empowered to take such actions as may be necessary to ensure the competence and integrity of any person who claims to be an occupational therapist or who holds himself out to the public as an occupational therapist, and to that end it may license practitioners as occupational therapists.

§ 54.1-2956.2. Advisory Board of Occupational Therapy.

The Advisory Board of Occupational Therapy, referred to hereinafter as "Advisory Board," shall assist the Board in the manner set forth in this chapter.

§ 54.1-2956.3. Advisory Board of Occupational Therapy; composition; appointment.

The Advisory Board shall be comprised of five members appointed by the Governor for four-year terms. Three members shall be at the time of appointment occupational therapists who have practiced for not less than three years, one member shall be a physician licensed to practice medicine in the Commonwealth, and one member shall be appointed by the Governor from the Commonwealth at large. Any vacancy occurring during a member's term shall be filled for the unexpired balance of that term.

§ 54.1-2956.4. Advisory Board of Occupational Therapy; powers.

The Advisory Board shall, under the authority of the Board:

- 1. Recommend to the Board for its enactment into regulation the criteria for licensure as an occupational therapist and the standards of professional conduct for holders of licenses.*
- 2. Assess the qualifications of applicants for licensure and recommend licensure when applicants meet the required criteria. The recommendations of the Advisory Board on licensure of applicants shall be presented to the Board, which shall then issue or deny licenses. Any applicant who is aggrieved by a denial of recommendation on licensure of the Advisory Board may appeal to the Board.*
- 3. Receive investigative reports of professional misconduct and unlawful acts and recommend sanctions when appropriate. Any recommendation of sanctions shall be presented to the Board, which may then impose sanctions or take such other action as may be warranted by law.*
- 4. Assist in such other matters dealing with occupational therapy as the Board may in its discretion direct.*

§ 54.1-2956.5. Restriction of titles.

It shall be unlawful for any person not holding a current and valid license from the Board to claim to be an occupational therapist or to assume the title "Occupational Therapist," "Occupational Therapist, Licensed," "Licensed Occupational Therapist," or any similar term, or to assume the designations "O.T." or "O.T.L." However, a person who has graduated from a duly accredited educational program in occupational therapy shall be exempt from the preceding prohibition until he has taken and received the results of any examination required by the Board or until one year from the date of graduation, whichever occurs sooner. This section shall not be construed to prohibit any person operating under the supervision of an occupational therapist pursuant to such requirements as may be imposed by the Board from claiming to practice occupational therapy or from using the title "Certified Occupational Therapy Assistant" or any variation thereof, or from assuming the designations "O.T.A." or "C.O.T.A."

Amendments to Chapter 29 of Title 54.1

The proposed regulations are being promulgated to comply with statutory provisions of Senate Bill 599 (Chapter 593) of the 1998 General Assembly. These regulations are being promulgated as replacement for the Emergency Regulations mandated by a second enactment clause, which required the Board of Medicine to promulgate regulations to implement the act to be effective within 280 days of the enactment. (See attached copy of Chapter 593)

d. Letter of assurance from the office of the Attorney General.

See attached.

e. Summary of Public Comment received in response to the Notice of Intended Regulatory Action.

The Notice of Intended Regulatory Action was published on March 1, 1999 and subsequently sent to the Public Participation Guidelines Mailing List of the Board; there was no comment received.

f. Changes to existing regulations.

18 VAC 85-80-10. A definition of “active practice” was added in the proposed regulations (not included in the emergency regulations) to specify that the active practice of occupational therapy may include activities that are not direct patient care. Other amendments are technical and not substantive.

18 VAC 85-80-25. A new section was added to require licensees to furnish current name and address within 30 days of any change and to specify that notices mailed or served by the Board to the name and address on file shall be validly given.

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18 VAC 85-80-70. The current regulations require that an occupational therapist be professionally active in order to renew each biennium. The amendment will specify what is intended by the requirement – that the licensee must have practiced at least 160 hours during the past biennium. Other amendments are editorial only.

18 VAC 85-80-80. A proposed amendment will require that anyone who has allowed his license to lapse for two or more years should serve a board-approved practice of at least 160 hours under the supervision of a licensed occupational therapist.

g. Statement of reasoning for the regulations.

On the effective date of the legislation changing regulation of occupational therapists from certification to licensure, the Board revised its regulations to change from certification to licensure under an exemption from the APA. On advice from the Assistant Attorney General, § 9-6.14:4. (C) (4) was applicable and the amendments were exempt from Article 2 of the Administrative Process Act, as “necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved”. In making those amendments, the Board was not able to consider any changes which were discretionary and not strictly conforming to changes in the statute.

The legislation also, however, had an enactment clause requiring the Board to promulgate emergency regulations. In the development of those regulations, the Advisory Board on Occupational Therapy reviewed the qualifications for licensure, including education and examination and the requirements for renewal of licensure. The regulations were reviewed for consistency with statutory provisions, with regulations for licensure of other professions under the Board of Medicine, and with national standards in occupational therapy.

The reasoning for these proposed regulations, which replace emergency regulations is that the Board is required by § 54.1-2956.1 to “take such actions as may be necessary to ensure the competence and integrity of any person who claims to be an occupational therapist or who holds himself out to the public as an occupational therapist, and to that end it may license practitioners as occupational therapists.” Before July 1, 1998, occupational therapists were certified by the Board of Medicine; certification was title protection and therefore voluntary for practitioners.

As a certified profession regulated by the Board of Medicine, occupational therapists were required to indicate some professional activity as evidence of competency for biennial renewal

of a license, but the level of that activity was undefined. Since they are now a licensed profession, it is expected that there be some further definition of active practice to determine qualification for initial licensure and for continued renewal of licensure. The Board determined that evidence of 160 hours of active practice in the profession within the past two years was the least burdensome regulation it could reasonably impose. Such a requirement is consistent with other professions that have a requirement for active practice, such as physical therapy and respiratory therapy.

h. Statement on alternatives considered.

The Board did not consider alternatives to the promulgation of regulations as it was mandated to do so by the statute. It did adopt the least burdensome regulation consistent with the specific provisions of the statutes and with its concern for public health and safety.

If the Board intends for the emergency regulations to become permanent, they must be replaced within one year with the proposed replacement regulations filed with the Registrar within 180 days of the effective date.

The requirement for passage of an entry-level examination offered by the National Board for Certification in Occupational Therapy as a requirement for licensure is the only reasonable alternative; there are no other examinations offered in occupational therapy, and the Board does not want to incur the expense and legal risk of developing its own.

The current regulations require 160 hours of supervised practice for an applicant or a lapsed licensee who has been out of practice for six or more years. In adopting regulations for licensure, the Advisory Board strongly recommended changing the regulation to require supervised practice for anyone who has not actively practiced for two or more years. With the changes occurring in health care, an occupational therapist who has not practiced at least 160 hours over a two-year period has likely not remained current with professional knowledge and skills.

An occupational therapist who is maintaining an active license to practice should be required to work a minimal number of hours during the biennium in order to keep up with a rapidly changing, highly technical field. The requirement of 160 hours of practice (the equivalent of four weeks) with a two-year period is easily obtainable, even for persons who are working only on a part-time basis.

To accommodate persons whose practice as an occupational therapist may now include educational, administrative, supervisory or consultative services rather than direct patient care, the Board added a definition of “active practice” to clarify that those professional activities were acceptable for the purpose of fulfilling the renewal or initial licensure requirements.

i. Statement of clarity.

Prior to the adoption of emergency regulations by the Board, the Advisory Board on Occupational Therapy and the Legislative Committee discussed the changes in open sessions. The clarity and reasonableness of the language which was adopted had the approval of the occupational therapists, the Assistant Attorney General who worked with the Advisory Committee in drafting regulatory language, and members of the Board.

j. Schedule for review of regulation.

The proposed amendments to these regulations will be reviewed following publication in the Register and the 60-day public comment period. If there are any oral or written comments received, the Board will consider revisions to the proposal prior to adoption of final regulations.

Public Participation Guidelines of the Board of Medicine (18 VAC 85-10-10 et seq.) require a thorough review of regulations each biennium. Therefore, the Advisory Board on Occupational Therapy and the Legislative Committee of the Board will review this set of regulations in 2001 and will bring any recommended amended regulations to the full board for consideration.

In addition, the Board receives public comment at each of its meetings and will consider any request for amendments. Petitions for rule-making also receive a response from the Board during the mandatory 180 days in accordance with its Public Participation Guidelines.

k. Anticipated Regulatory Impact

Projected cost to the state to implement and enforce:

(i) Fund source: As a special fund agency, the Board of Medicine must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation.

(ii) Budget activity by program or subprogram: There is no change required in the budget of the Commonwealth as a result of this program.

(iii) One-time versus ongoing expenditures: The agency will incur some costs (less than \$1000) for mailings to the Public Participation Guidelines Mailing List, conducting a public hearing, and sending copies of final regulations to regulated entities. Since these regulations are being amended simultaneously with other regulations of the Board, the costs of mailings, meetings and hearings will be shared by several professions. In addition, every effort will be made to incorporate those into anticipated mailings and board meetings already scheduled.

Projected cost on localities:

There is no projected costs to localities.

Description of entities that are likely to be affected by regulation:

The entities that are likely to be affected by these regulations would be licensed occupational therapists.

Estimate of number of entities to be affected:

There would be no additional costs for compliance with these regulations for the 1,769 occupational therapists who have kept a current license in the Commonwealth. While the Board has not kept a record of lapsed licensees, it is estimated that there have been less than 5 persons who have allowed their license to lapse for more than one year. Most have resumed practice within 6 months to one year. Therefore, it is unknown whether anyone would be affected by the reinstatement requirement of 160 hours of practice under the supervision of a licensed occupational therapist.